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Nos. 87-1872, 87-6673, and 87-6898

In the Supreme Court of the United States

OCTOBER TERM, 1987

JERRY ROSENSTEIN AND DONALD SANDERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ANTONIO NIGO-MARTINEZ AND
SALVADOR JARABA, PETITIONERS

v.

UNITED STATES OF AMERICA

JERALD WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the term of a special grand jury convened under 18 U.S.C. 3331 is extended where, before the grand jury's term expires, the district court determines that the grand jury has not completed its investigation but fails to enter a formal written order reflecting that determination.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

United States v. *Armored Transport, Inc.*, 629 F.2d 1313 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981)	11
United States v. *Fein*, 504 F.2d 1170 (2d Cir. 1974)	11
United States v. *Macklin*, 523 F.2d 193 (2d Cir. 1975)	11
United States v. *Mechanik*, 475 U.S. 66 (1986)	11

Statutes and rules:

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922	9
18 U.S.C. (1940 ed.) 556	11
18 U.S.C. 1001	2
18 U.S.C. 1503	2
18 U.S.C. 1962	2
18 U.S.C. 2314	2
18 U.S.C. 3331	3, 5, 9, 10
18 U.S.C. 3331(a)	3, 5, 7, 8, 9, 10
18 U.S.C. 3331(b)	6, 9
21 U.S.C. 841(a)	2
21 U.S.C. 846	2
Fed. R. Crim. P.:	
Rule 6 advisory committee note (1983 Amendment)	11, 12
Rule 6(g)	6, 11
Rule 52(a) advisory committee note	10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1872

JERRY ROSENSTEIN AND DONALD SANDERS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 87-6673

ANTONIO NIGO-MARTINEZ AND
SALVADOR JARABA, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 87-6808

JERALD WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 841 F.2d 1300.[1]

[1] "Pet. App." refers to the appendix to the petition in No. 87-1872.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1988. A petition for rehearing was denied on March 15, 1988. The petition for a writ of certiorari in No. 87-1872 was filed on May 16, 1988. The petition for a writ of certiorari in No. 87-6673 was filed on March 23, 1988. The petition for a writ of certiorari in No. 87-6808 was filed on April 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 22, 1986, the Special December 1983 Grand Jury sitting in the Northern District of Illinois returned a superseding indictment charging petitioners Rosenstein and Sanders (No. 87-1872) and others with various offenses, including conspiracy to steal, dismantle, and transport automobiles and parts, in violation of 18 U.S.C. 1962 and 2314. Both petitioners pleaded guilty to two counts of the indictment in December 1986, and each was sentenced to eight years' imprisonment, to be followed by five years' probation. On November 17, 1986, the same grand jury returned an indictment charging petitioner Wilson (No. 87-6808) with making false statements to the government, in violation of 18 U.S.C. 1001, and with obstructing justice, in violation of 18 U.S.C. 1503. After a jury trial, he was convicted on all counts. On July 22, 1986, the Special October 1984 Grand Jury sitting in the Northern District of Illinois returned a two-count indictment charging petitioners Jaraba and Nigo-Martinez (No. 87-6673) with conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a). Following a jury trial, each was convicted on both

counts and was sentenced to concurrent terms of five years' probation on each count.

1. The Special December 1983 Grand Jury was convened on December 2, 1983, pursuant to 18 U.S.C. 3331. Prior to the expiration of the initial 18-month term, Chief Judge McGarr entered a written order, dated May 25, 1985, that effectively extended the grand jury's term for six months. Prior to the expiration of that extension, Chief Judge McGarr entered another written order, dated November 25, 1985, that effectively extended the grand jury's term for an additional six months.[2] Chief Judge McGarr did not enter a third formal written order extending the grand jury's term prior to the expiration of the second extension on June 2, 1986. The grand jury, however, continued to meet and to return indictments after that date, including the indictments on which petitioners Rosenstein, Sanders, and Wilson were convicted. On several occasions both prior to and after June 2, Chief Judge McGarr instructed the grand jury to resume deliberations.

The Special October 1984 Grand Jury was convened pursuant to 18 U.S.C. 3331 in October 1984. In March 1986, prior to the expiration of its initial 18-month term in April, the grand jury voted unanimously to continue its work. No formal written order extending the grand jury's term was entered, although the grand jury continued to appear weekly before Chief Judge McGarr (and later Judge Grady) for ten months after the expiration of the 18-month term. It returned the indictment against petitioners Jaraba and Nigo-Martinez in July 1986.

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[2] The orders stated that the grand jury term was extended "until further notice," but the statute provides for only six-month extensions (18 U.S.C. 3331(a)).

Following the discovery that there were no written orders extending the Special December 1983 Grand Jury and the Special October 1984 Grand Jury, the United States Attorney's Office presented corrective nunc pro tunc orders to Chief Judge McGarr.[3] With respect to the Special December 1983 Grand Jury, Chief Judge McGarr entered a nunc pro tunc order on February 21, 1987, stating that he had determined prior to May 25, 1986, that the grand jury had not completed its work (Pet. App. 7a n.10). With respect to the Special October 1984 Grand Jury, Chief Judge McGarr entered a nunc pro tunc order on March 3, 1987, stating that he had determined in March 1986 that the grand jury had not completed its work (*id.* at 9a n.11).

2. In April 1987, petitioners Rosenstein and Sanders moved to set aside their convictions, to vacate their sentences, and to dismiss the indictment against them. They argued that the Special December 1983 Grand Jury was without authority to indict when it returned the indictment on September 22, 1986, because there was no written order extending its term beyond the expiration of the second extension on June 2, 1986. On March 26, 1987, petitioner Wilson moved to dismiss the indictment and to vacate his judgment of conviction on the same ground, because he had been indicted by the Special December 1983 Grand Jury on November 17, 1986. The district court granted both motions, and the government appealed.

In April 1987, petitioners Jaraba and Nigo-Martinez moved to vacate their convictions and to preclude further prosecution. They argued that the Special October 1984 Grand Jury was without authority to indict when it re-

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[3] As the court of appeals noted (Pet. App. 3a, 4a n.2), a similar problem exists with the Special January 1985 Grand Jury convened in the Northern District of Illinois.

turned the indictment against them on July 22, 1986, because there was no written order extending the grand jury's term beyond the expiration of the initial 18-month period in April 1986. The district court denied the motion, and petitioners appealed.

3. The court of appeals held the indictments valid (Pet. App. 1a-20a). The court ruled that the terms of both special grand juries had been properly extended under 18 U.S.C. 3331(a) at the times the indictments against petitioners were returned. The court first concluded that Section 3331(a) extends the special grand jury's term whenever the district court makes a determination prior to the expiration of the grand jury's term that the grand jury has not completed its business. Thus, the statute "requires only this judicial determination—not the ministerial act of memorializing it by formal order—to effect the valid extension of a special grand jury" (Pet. App. 13a).

The court reasoned that this view is in accord with the statutory language,[4] if read not with " 'slavish literalism' " but with an eye toward discerning the statute's purpose based on the "statute as a whole" and its history (Pet. App. 13a (citation omitted)). The court explained (*id.* at 13a-15a) that Section 3331 was deliberately written to give the special grand juries, which were created to investigate

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[4] Section 3331(a) states in pertinent part:

> The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in [Section 3333(e)].

complex organized crime offenses, an unusually long tenure (as much as 36 months, rather than the ordinary 18-24 months under Fed. R. Crim. P. 6(g)) and an unusual degree of independence from the supervising court: the statute thus grants such a special grand jury protection against involuntary termination by the court, allowing the grand jury to take an appeal to the chief judge of the circuit if the district court orders it discharged or fails to extend its term (18 U.S.C. 3331(b)). Since such a grand jury is protected against intentional unwarranted disruptions by the district court, the court pointed out, the statute could not sensibly be construed to deprive the grand jury (and its indictments) of protection against a mere inadvertent omission by the district court, such as a failure to enter a written order memorializing the court's determination that an extention of the grand jury's term is warranted. Hence, the court concluded (Pet. App. 16a-17a), although it would have been preferable for the district court to enter an order at the time of the extensions, the mere absence of a contemporaneous written order was not fatal if there was other "reliable and unequivocal" evidence establishing that the district court actually made the determination that the special grand jury had not finished its business.

The court of appeals found (Pet. App. 18a-19a) the required proof that the district court here had made the determinations that were required to extend each special grand jury's term. Based on the order of February 21, 1987, the court concluded (*id.* at 18a) that the district judge had made a finding prior to May 25, 1986, that the Special December 1983 Grand Jury had not completed its investigation. The court of appeals similarly concluded (*id.* at 19a) that the order of March 3, 1987, established that the district judge had made a finding in March 1986

that the Special October 1984 Grand Jury had not finished its business. Accordingly, the court of appeals held (*id.* at 20a) that "the Special December 1983 Grand Jury was validly extended until December 2, 1986 and the Special October 1984 Grand Jury was validly extended until 24 months from the date of its impanelment," and the indictments against petitioners were therefore valid.[5]

ARGUMENT

These cases present a question of first impression involving the construction of 18 U.S.C. 3331(a). The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of any other court of appeals. In addition, the narrow issue presented here is not likely to arise often. Further review by this Court is therefore unwarranted.

1. Petitioners renew their contention (87-1872 Pet. 7-11; 87-6673 Pet. 3-4; 87-6808 Pet. 3-5) that the district court's failure to enter an order extending the term of the special grand juries convened under 18 U.S.C. 3331(a) deprived the special grand juries of the power to return valid indictments. That contention is incorrect.

To begin with, the court of appeals adopted the most reasonable construction of Section 3331(a)—that what operates to extend the term of a special grand jury is the

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[5] The court noted (Pet. App. 5a n.3, 19a) that it was unclear from the record on which date in October 1984 the Special October 1984 Grand Jury was empaneled. Because one defendant who is not a petitioner here was originally indicted on October 14, 1986, which might have been beyond the first extension, and was the subject of two superseding indictments that were returned in January 1987, the court remanded the case for a determination of the empanelment date and whether a judicial finding had been made prior to the expiration of the first extension that the grand jury had not finished its business.

district court's determination that the grand jury's work is not completed, rather than the ministerial act of formally memorializing that determination. Although Section 3331(a) plainly envisions that entry of a judicial order will ordinarily be the means by which the term of a special grand jury is extended, the statute does not by its terms strictly require such an order for a valid extension, let alone an order contemporaneous with the judicial determination that the grand jury has not completed its business. As the court of appeals explained, "in the absence of a statutory provision requiring the entry of a written order," the statute is most sensibly read to make the judicial determination itself, as proved by reliable evidence, "the operative act of the court" (Pet. App. 17a).

The judicial determination fulfills the purpose of the statute—to ensure that a special grand jury is not allowed to continue past a specified time without an independent check on its progress toward completion of its work. It is the judicial determination that provides that check. The act of memorializing the determination in an order is purely ministerial. Although such an order is the best evidence that the determination was made, its significance is only evidentiary. But where, as here, there is other "reliable and unequivocal" evidence (Pet. App. 17a) that the determination was in fact made (based on the court's later findings and the fact that the court repeatedly had the grand juries resume deliberations both before and after the date on which extensions were needed), the statutory requirement is satisfied.

Reading Section 3331(a) to render a special grand jury's actions void because of the district court's inadvertent failure to perform a ministerial task would be contrary to the overall statutory design. As the court of appeals ob-

served (Pet. App. 14a-15a), Section 3331, which was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, gives enhanced powers to the special grand juries established to investigate organized crime: it permits them to serve for longer periods and gives them a greater degree of independence from their supervising courts than regular grand juries (see Fed. R. Crim. P. 6). Thus, in addition to allowing the special grand jury's term to be extended up to 36 months, Section 3331(a) provides that a special grand jury may not be discharged before it has served its initial 18 months unless the grand jury itself determines that it has finished its business and the court enters an order for its discharge. At the same time, Section 3331(b) protects the grand jury against the district judge's erroneous actions by providing a mechanism for the grand jury to appeal to the chief judge of the circuit if a district judge discharges the grand jury early or fails to extend its term when its business remains unfinished.

It would be inconsistent with the autonomy established by those provisions to invalidate the work of such a grand jury because of the district court's failure to perform a ministerial act recording an otherwise valid determination that the grand jury should continue, especially when the grand jury has repeatedly been directed to resume deliberations.[6] As the court of appeals reasoned (Pet.

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[6] As the court of appeals observed (Pet. App. 14a (emphasis in original)), the language of Section 3331(b) also suggests that entry of a written order of extension should not be determinative under Section 3331(a). Subsection (b) conditions the grand jury's right to appeal to the chief judge on "the entry of an order in the case of the *discharge* of a grand jury * * *, [but] it mentions no such requirement in the case of an *extension*." The provision thus allows an appeal from a "fail[ure] to extend the term" (18 U.S.C. 3331(b)), not from a "failure to enter an order extending the term."

App. 14a), it makes no sense to read Section 3331(a) as subjecting the grand jury to disruption because of mere oversight by the district court when the grand jury is protected against even intentional disruptions by the court. Indeed, while an intentional failure to extend the grand jury's term would presumably come to the attention of the grand jury and therefore be subject to correction through an appeal to the chief judge of the circuit, a district court's failure to enter an order would presumably not be noticed by the grand jury, especially if it continues to report to the court and the court continues to direct it to resume deliberations. In that circumstance, the opportunity for corrective action is not present, and it is even less appropriate to invalidate the grand jury's actions.

For those reasons, the court of appeals reasonably construed Section 3331(a) to mean that a special grand jury's term is extended whenever, as proved by a written order or by "other reliable and unequivocal evidence" (Pet. App. 17a), the supervising court makes the required determination that the grand jury has not completed its business. Because it was clearly established that that determination was made in these cases, the terms of the special grand juries were properly extended. There was therefore no error in the grand jury's return of the indictments.

In any event, even if Section 3331(a) were construed to require a written order for a proper extension of the grand jury, the judgment of the court of appeals would nonetheless be correct. Any such error was harmless and should be disregarded under Fed. R. Crim. P. 52(a). This is not a case in which a grand jury returns an indictment after an absolute statutory limit on its tenure has been exceeded. Here, the grand jury was acting well within the 36 months allowed by 18 U.S.C. 3331. Moreover, there was "reliable and unequivocal" proof that the determination required by the statute was in fact made by the district court.

The only deficiency was the absence of a formal order memorializing that determination.[7] The failure to enter such an order did "not affect substantial rights" of petitioners and is therefore no ground for dismissing the indictments and overturning petitioner's convictions (Fed. R. Crim. P. 52(a)). See Rule 52(a) advisory committee note (noting that the rule is "a restatement of existing law," citing 18 U.S.C. (1940 ed.) 556, which said that "[n]o indictment * * * shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant").

2. Petitioners also contend (87-1872 Pet. 12; 87-6673 Pet. 4) that the decision of the court of appeals conflicts with the decisions of the Second Circuit in *United States* v. *Fein*, 504 F.2d 1170 (1974), and *United States* v. *Macklin*, 523 F.2d 193 (1975), and with the decision of the Ninth Circuit in *United States* v. *Armored Transport, Inc.*, 629 F.2d 1313 (1980), cert. denied, 450 U.S. 965 (1981). That contention is wholly without merit. The cited decisions held only that a regular grand jury is without power to return a valid indictment after the expiration of the absolute, non-extendable time it is permitted to sit; the lapse of such time, of course, is an incurable defect.[8] Those

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[7] This case does not involve an error committed before the grand jury or any question about the effect of such an error on its decision to return an indictment or on a subsequent conviction. Cf. *United States* v. *Mechanik*, 475 U.S. 66 (1986).

[8] At the time of those decisions, regular grand juries were limited by Rule 6, Fed. R. Crim. P., to 18-month terms, which could not be extended. Rule 6(g) was amended in 1983 to allow extensions of a regular grand jury's term. The Rule currently provides:

> A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court ex-

decisions are irrelevant to whether, as the court of appeals held, the term of a special grand jury is properly extended by the required judicial determination without a formal written order. And none of those decisions involved an error that was harmless because it could be fully corrected by a purely ministerial act.[9]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1988

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tends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. * * *

See Fed. R. Crim. P. 6 advisory committee note (1983 Amendment).

[9] In the *Armored Transport* case, the court held that the invalidity of the indictment did not require reversal of the convictions because the prosecution could have proceeded by information.

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